(32) (31)

Nos. 03-334, 03-343

Supreme Court, U.S.
FILED
JAN 12 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SHAFIQ RASUL, et al.,

Petitioners,

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, et al.,

Respondents.

FAWZI KHALID ABDULLAH
FAHAD AL ODAH, et al.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District of Columbia Circuit**

BRIEF OF *AMICUS CURIAE* OMAR AHMED KHADR BY HIS NEXT FRIEND FATIMA EL-SAMNAH IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The *amicus curiae* Omar Ahmed Khadr ("Omar") is one of several children and the only Canadian citizen currently detained in Guantánamo Bay, Cuba. Like the Petitioners, Omar is virtually *in communicado* and his grandmother Fatima El-Samnah acts as his Next Friend.

Reports indicate that Omar was first captured in Afghanistan in July of 2002 when he was fifteen years old. Since that time, Omar has been forcibly separated from his mother, his siblings, and his grandparents. There is no present indication of an intention to reunite Omar with his family.

It is known that Omar sustained serious injuries at the time of his capture and that he experiences ongoing health concerns. He has lost approximately ninety percent of the vision in his left eye and is also believed to be recovering from bullet wounds.

In approximately the late fall of 2002, Omar was taken from Bagram, Afghanistan, and flown across the globe to Guantánamo Bay, Cuba. As a consequence of Omar's plane having landed some ninety miles short of the coast of Florida, he has not been brought before any independent judicial authority for a determination of his legal status, nor has he been advised of any formal charges or allegations raised against him. Although Canadian intelligence officials have been permitted to question

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or his counsel, make a monetary contribution to the preparation or submission of this brief.

Omar on at least one occasion, he has been accorded visits from neither his family nor independent counsel.

Omar wishes to exercise his fundamental right to challenge the legality of the deprivation of his liberty before a court of competent, independent and impartial authority, and to a prompt decision thereon. He submits this brief, through his Next Friend, in support of Petitioners' position seeking reversal of the decision of the Court of Appeals.

SUMMARY OF ARGUMENTS

The *amicus curiae* Omar Ahmed Khadr is mindful of Rule 37 of the *Rules of the Supreme Court of the United States*, as well as the fact that many other parties and *amici* have filed briefs before this Court in these appeals. As such, these submissions are limited to two topics arising from the *amicus curiae*'s status as a child and as a Canadian national.

The *amicus curiae* refers this Court to the principles of international law that require states to protect the rights of children deprived of their liberty. While children also enjoy protection under such generally applicable instruments as the *Geneva Conventions*, instruments such as the United Nations *Convention on the Rights of the Child* emphasize the need to accord special protection to children. The *amicus curiae* contends that in deciding the issues raised in these appeals, the Court should interpret the Constitution in a manner consistent with the fundamental principles of international law contained in these instruments.

As a Canadian, and to assist this Court in confronting new and difficult issues recently addressed by sister common law jurisdictions, the *amicus curiae* refers this Court to recent decisions of the Supreme Court of Canada. These decisions, while of course not binding upon this Court, may prove instructive. They address the extent to which the Constitution of Canada may be applied to the conduct of Canadian government officials committed outside Canada's geographic boundaries. It is submitted that a similar balancing test to that enunciated by the Supreme Court of Canada in *R. v. Cook*, [1998] 2 S.C.R. 597, ought to be adopted by this Court in these appeals. The test in *Cook* – which may be invoked by Canadian nationals and foreigners alike – provides that the domestic courts of Canada may apply the Constitution beyond Canada's sovereign territory where: (1) the conduct in question is that of Canadian government officials, and (2) the application of the Constitution will not interfere with the sovereign authority of the foreign state and thereby generate an objectionable extra-territorial effect.

In sum, the *amicus curiae* submits that this Court ought to interpret the Constitution in a manner consistent with the principles of international law and consistent with the decisions of other nations whose government actors travel the world. This Court should recognize jurisdiction on the part of the domestic courts of the United States to review the conduct of United States government actors in Guantánamo Bay, and reverse and remand these matters for further proceedings on the merits.

ARGUMENT

I. The Rights of Children Under International Law

The *amicus curiae* supports and adopts the submissions of the Petitioners and *amici* regarding the applicability of customary international law as domestic law and the use of international law as an aid in constitutional interpretation.

The Supreme Court of Canada has recently emphasized the importance of standards and principles of international law in ensuring the protection of children. In the concurring reasons of L'Heureux-Dubé, Gonthier and Bastarache JJ. in *R. v. Sharpe*, [2001] 1 S.C.R. 45, it was stated:

> The protection of children from harm is a universally accepted goal. While this Court has recognized that, generally, international norms are not binding without legislative implementation, they are relevant sources for interpreting rights domestically. . . .
>
> [A] balancing of competing interests [in constitutional interpretation] must be informed by Canada's international obligations. The fact that a value has the status of an international human right is indicative of the high degree of importance with which it must be considered. . . .
>
> Both legislators abroad and the international community have acknowledged the vulnerability of children and the resulting need to protect them. It is therefore not surprising that the *Convention on the Rights of the Child* has been ratified or acceded to by 191 states as of January 19, 2001, making it the most universally accepted human rights instrument in history.

Id. at 140-41.

As noted in *Sharpe*, *supra*, the most significant instrument regarding the rights of children under international law is the Convention on the Rights of the Child, U.N.G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* 2 September 1990 (the "CRC"). Although never adopted as domestic legislation by the Parliament of Canada, the provisions of the CRC were nevertheless applied by the Supreme Court of Canada as an interpretive aid to federal legislation in the case of *Baker v. Canada* (*Minister of Employment and Immigration*), [1999] 2 S.C.R. 817. In that case, the Court interpreted provisions of immigration statutes relating to families in removal proceedings in a manner consistent with the CRC.

The United States and Somalia are the only two nations not to have ratified the CRC. However, on February 16, 1995, the United States signed the CRC, thereby affirming its obligation "to refrain from acts which would defeat the object and purpose of [the] treaty," Vienna Convention on the Law of Treaties, U.N.T.S., vol. 1155, p. 331, *entered into force* 27, Art. 18. Additionally, on January 23, 2003, the United States ratified two Optional Protocols to the CRC, namely the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, U.N.G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49), U.N. Doc. A/54/49 (2000), *entered into force* 12 February 2002, and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, U.N.G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49), U.N. Doc. A/54/49 (2000), *entered into force* 18 January 2002.

More importantly, in light of its near-universal acceptance, the CRC has been recognized and applied by the courts of the United States as customary international law. For example, in *Beharry v. Reno*, 183 F. Supp.2d 584, 600 (E.D.N.Y. 2002), rev'd on other grounds, *Beharry v. Ashcroft*, 329 F.3d 51 (2003), the District Court for the Eastern District of New York noted the widespread acceptance of the CRC: "This overwhelming acceptance is strong reason to hold that some CRC provisions have attained the status of customary international law." And in *Sadeghi v. I.N.S.*, 40 F.3d 1139, 1147 (CA10 1994), it was noted that "The Convention on the Rights of the Child has been ratified by 166 nations, including Iran! Moreover, it has attained the status of customary international law."

Article 37 of the CRC provides:

> States Parties shall ensure that:
>
> . . . .
>
> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
>
> . . . .
>
> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 37 of the CRC codifies longstanding and widely-accepted principles of law. Moreover, the rights enshrined in the CRC apply to "every child" regardless of citizenship or reasons for detention. These same principles are embodied in the International Covenant of Civil and Political Rights, U.N.G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* 3 January 1976 (the "ICCPR"), which both the United States and Canada have signed and ratified. Article 9.4 of the ICCPR provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

It has been widely recognized throughout the world that the indefinite detention without charge of the *amicus curiae* and other children by the Respondents constitutes a "flagrant breach" of international law. In the Parliamentary Assembly of Europe's Resolution No. 1340 (2003) (Adopted June 26, 2003), it was resolved:

> 1. The Parliamentary Assembly:
>
> . . . .
>
> ii. notes that a number of children are being held in Guantánamo Bay, including a "handful" of children between 13 and 15 years of age transferred from the Bagram Air Base in 2003, and a 16-year old Canadian national transferred at the end of 2002;
>
> iii. believes that children should only be detained as a last resort and that they require special protection; that the continuing

> detention of these young people is a most flagrant breach of the United Nations Convention on the Rights of the Child.

The protection of children from harm is a universally accepted goal and a fundamental tenet of both international law and domestic law. The Constitution should be interpreted in a manner requiring executive authority to be exercised in a manner consistent with these most fundamental of principles. An interpretation contrary to that advanced by the Petitioners in this case would entail a conclusion that the United States has acted in violation of international law – a result which must be avoided where an alternative conclusion is available.

II. The Extra-Territorial Application of Constitutional Law

Between the United States and Canada lies the longest undefended border in the world. Each nation shares an interest in ensuring the fair treatment of its citizens by its neighbor's government, and each has a proud constitutional tradition of recognizing basic human rights. In assessing the issues in this case, this Court ought to consider and adopt the jurisprudence recently developed by the Supreme Court of Canada in relation to the treatment of U.S. citizens by Canadian government officials outside Canada's sovereign territory.

A. *United States v. Verdugo-Urquidez* and *R. v. Terry*

In addition to *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the decision of the Court of Appeals below was based in large measure upon this Court's decision in

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). In *Verdugo-Urquidez*, federal agents of the United States had arranged to conduct searches of defendant Verdugo-Urquidez's residences in Mexico. The searches were authorized by the Director General of the Mexican Federal Judicial Police, and carried out in concert with Mexican officials. Under those circumstances, this Court held that Verdugo-Urquidez had no right to challenge the constitutionality of the searches because the Fourth Amendment did not apply extra-territorially to the conduct that occurred in Mexico.

A decision similar to *Verdugo-Urquidez* was rendered by the Supreme Court of Canada in *R. v. Terry*, [1996] 2 S.C.R. 207. In that case, defendant Terry had been apprehended by American police officers in Santa Rosa, California, pursuant to an extradition warrant issued by a federal district court. At the request of Canadian police officers, the Santa Rosa police interviewed Terry and obtained incriminating statements from him. Following his extradition to Canada, Terry sought to have his statements excluded by operation of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). Writing for the unanimous Supreme Court of Canada, Justice McLachlin (as she then was) held that Terry could not challenge the constitutionality of the interview since the *Charter* did not apply extra-territorially to the conduct of the Santa Rosa police. This was so despite the fact that the interview had been conducted at the behest of Canadian police officers. Noting the historical pedigree of territorial jurisdiction (and implicitly acknowledging the value of considering the case law from sister jurisdictions), Justice McLachlin held that applying the *Charter* to the conduct of the Santa Rosa police would offend traditional notions of sovereignty:

> Such a finding would run counter to the settled rule that a state is only competent to enforce its laws within its own territorial boundaries. As Marshall C.J. put it in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), at p. 136, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."
>
> *Id.* at 215.

B. *R. v. Cook*

In the subsequent case of *R. v. Cook*, [1998] 2 S.C.R. 597, Cook, a U.S. citizen, had been arrested in New Orleans by U.S. officials pursuant to a warrant issued in response to a Canadian extradition request for a murder committed in Canada. Canadian detectives attended in New Orleans and interviewed Cook about the murder. Following his extradition, Cook applied to have his statement excluded by operation of the *Charter*. The Crown argued that *Terry* was controlling precedent and had previously established that the *Charter* did not apply to conduct committed outside the geographic boundaries of Canada.

In a 5-2 decision, the Supreme Court of Canada noted that *Terry* had addressed an exercise of legal authority by the government officials of a foreign nation; the interview in *Terry* had been conducted by American police officers, and the fact that they were acting at the behest of (and conceivably as agents for) Canadian police officers did not change that fact. By contrast, in *Cook*, the interview was conducted by Canadian police officers themselves (albeit in

United States territory). This consideration was found to be decisive requiring *Terry* to be distinguished.

Having declined to follow *Terry*, the Court in *Cook* enunciated a new approach to the extra-territorial application of the Canadian *Charter*. The domestic courts of Canada may now apply the *Charter* beyond Canada's sovereign territory where a two part test is satisfied: (1) the conduct in question was that of Canadian government officials, and (2) the application of the *Charter* will not interfere with the sovereign authority of the foreign state and thereby generate an objectionable extra-territorial effect. *Id.* at 616, 625, 626, 627.

The Supreme Court of Canada's decision in *Cook* was informed by well established principles of international law and comity. The court noted that it was consistent with established principles of international law for the domestic courts of Canada to assert jurisdiction on the basis of the nationality of the police officers who had conducted the interview. The following passage by Oscar Schachter in INTERNATIONAL LAW IN THEORY AND PRACTICE (1991), at p. 254 was adopted:

> It had long been accepted that a State was entitled to apply its legislative (or prescriptive) authority to events and persons within its territory and to its nationals outside of the country. "Territoriality" and "nationality" were referred to as "bases" of jurisdiction and functioned as criteria of permissible authority. Territoriality is generally considered the normal basis of jurisdiction; nationality more exceptional, but always accepted in international relations.
>
> *Id.* at 618.

The court in *Cook* also noted that jurisdictional competence on the basis of the nationality of the police officers was an incident of Canada's sovereign equality and independence:

> The fundamental bases for the exercise of jurisdiction by a State are rooted in two aspects of the modern concept of the State itself: defined territory and permanent population. In principle, a State has jurisdiction over all persons, property and activities in its territory; a State also has jurisdiction over its nationals *wherever they may be*.
>
> *Id.* at 618. (Quoting Bernard H. Oxman, *Jurisdiction of States*, vol. 10, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (1987), at p. 279, with emphasis added by the court.)

The Attorney General of Canada had been granted intervener status in *Cook* and had argued that the application of the *Charter* to the New Orleans interview would ultimately confer *Charter* rights upon every person in the world. The Supreme Court of Canada was not persuaded by these arguments. At paragraph 53 the Court noted that the *Charter* will only apply extra-territorially under those exceptional circumstances where the two-part test is met. *Id.* at 628-29.

C. Adoption and Application to the Circumstances of this Case

The *amicus curiae* respectfully submits that this Court ought to adopt an approach to the extra-territorial application of the Constitution similar to that established by the Supreme Court of Canada in *R. v. Cook*. This approach has been developed in the context of today's

global economy where people and goods travel across borders at rates previously unimagined. It is carefully crafted to strike an appropriate balance between the basic human rights of the individual and the need to avoid interference with the sovereign legal authority of foreign governments.

As was the case in *Terry*, *supra*, this Court's previous decision in *Verdugo-Urquidez* addressed conduct that was specifically authorized and carried out by Mexican government authorities in accordance with Mexican law. Under these circumstances, the application of the Fourth Amendment to the searches at issue would have constituted an interference with the sovereign authority of Mexico and thereby generated an objectionable extra-territorial effect, *i.e.*, it would have failed the *Cook* test.

By contrast, in the present case, there can be no serious suggestion that the application of the laws of the United States to the government officials who are currently detaining the Petitioners and *amicus curiae* would generate an objectionable extra-territorial effect. The government of Cuba, while technically retaining "ultimate sovereignty" under the terms of the lease of Guantánamo Bay, does not purport to exercise legal authority over the persons detained therein. In the absence of such an objectionable extra-territorial effect, it is appropriate for this Court to distinguish its previous decision in *Verdugo-Urquidez*.

III. Conclusion

It is submitted by the *amicus curiae* Omar Ahmed Khadr that the Constitution must be interpreted in a manner consistent with the universally recognized goal to protect children from abuse and arbitrary detention.

With respect to the extra-territorial application of the Constitution, the nationality of the government officials who are arbitrarily detaining the Petitioners and *amicus curiae* is a valid basis for an exercise of jurisdiction under international law, and should be so as a matter of domestic constitutional law provided that no impermissible infringement on sovereignty is generated. Other constitutional democracies, sharing traditional common law notions of sovereignty, have so held.

For the foregoing reasons, this Court should reverse and remand these appeals for further proceedings consistent with such an approach.

Respectfully submitted,

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